

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment delivered on: October 01, 2014

+ W.P.(C) 452/2009

S.D. DOBHAL

..... Petitioner

Through: **Mr. S.N. Kaul, Advocate**

versus

UOI & ORS.

..... Respondents

Through: **Mr.A.K. Gautam, Advocate**

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MR. JUSTICE NAJMI WAZIRI

JUDGMENT

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KAILASH GAMBHIR, J.

1. The petitioner seeks quashing of the proceedings of DPC held in the month of April, 2004 for promotion to the rank of Senior Commandant against the vacancy for the year 2004-2005 and a mandamus directing the respondents to hold a Review DPC for the said post.

2. The petitioner is also aggrieved by the fact that his representation dated 10.5.2010 against the '*below benchmark*' grading for the period 1.4.2003 to 31.3.2004 and 1.4.2004 to 2.7.2004 was decided by the

Director General (CIS), who himself was the accepting authority and not by the authority superior to the accepting authority in terms of the DoPT guidelines.

3. The challenge of the petitioner concerning his two ACRs for the period 1.4.2003 to 31.3.2004 and from 1.4.2004 to 2.7.2004 is not the subject matter of the present writ petition but he was allowed to bring on record the subsequent facts regarding the said two adverse ACRs. Accordingly, his latter grievance also is under consideration in this petition.

4. The petitioner was an Ex. Army Officer who joined as an Assistant Commandant in the CISF in the year 1989. He was promoted to the post of Deputy Commandant and Commandant thereafter in the years 1995 and 2001 respectively. The promotion of the petitioner to the next rank of Senior Commandant was in the offing. The DPC was held on 18th April 2004 to consider the case of the petitioner for his promotion from the rank of Commandant to Senior Commandant to fill the vacancy for the year 2004-2005 and as per the settled norms, the DPC was required to consider ACRs of the five preceding years to test the suitability of the petitioner for promotion to the next rank.

5. As per the ACRs of the petitioner for the five preceding years, he was assessed 'Very Good' for the year 2000, 2001 and 2002 and so far as the years 1999 and 2003 are concerned; his gradings in ACRs were '*below benchmark*'. It is an admitted case of the parties that these two '*below benchmark*' grading were not communicated to the petitioner before his case was placed for consideration before the DPC held on 18th April 2004. It is further the petitioner's case that in the year 2004, disciplinary proceedings for major penalty were initiated against him under Rule 14 of the Central Civil Services (Classification, Control & Appeal) Rules, 1965 and he was placed under suspension during the said proceedings. Ultimately he was exonerated by the order dated 19th September 2006 of the Disciplinary Authority as none of the charges framed against him stood proved. Two ACRs of the petitioner covering the period from 1.4.2003 to 31.3.2004 and from 1.4.2004 to 2.7.2004 were also downgraded from 'Very Good' to 'Good' and copies of these ACRs were provided to the petitioner in the year 2010. He made various representations, one of them being on 10.5.2010, challenging the downgrading of his ACRs for the said two periods but the same was rejected by the Director General, CISF vide order dated 30.6.2010.

6. Addressing arguments on behalf of the petitioner, Mr. S.N. Kaul, learned counsel, raised twofold submissions. Firstly, with regard to the '*below benchmark*' grading of the petitioner for the period 1998-1999 and 2002-2003, which were not communicated to him, yet were considered by the DPC at the time of consideration of promotion of the petitioner to the rank of Senior Commandant due to which he was denied promotion while his juniors were promoted to the said higher post. Secondly, that the communication of the adverse ACRs for the period 1.4.2003 to 31.03.2004 and present ACR for 1.4.2004 to 2.7.2004 after a lapse of more than six years, i.e., on 10.5.2010 and also that rejection of his representations by the same officer who had assessed the said appraisal reports as accepting officer, although as per the guidelines laid down by DoPT, it was for the officer superior in rank to the accepting officer to decide the said representations of the petitioner.

7. The learned counsel for the petitioner submitted that it is an admitted case between the parties that the said two ACRs for the period from 1998 to 1999 and from 2002 to 2003 were not communicated to the petitioner before his case was placed for consideration before the DPC for his promotion to the post of Senior Commandant against the vacancy for

the year 2004-2005 and therefore, urged that directions be given to the respondents to hold a review DPC to consider the five ACRs of the petitioner preceding the year 2004, and ignore the said two ACRs which were never communicated to the petitioner.

8. To elaborate his arguments further, counsel for the petitioner placed reliance on the judgment of the Apex Court in the case of *Dev Dutt v. Union of India and Others*, (2008) 8 SCC 725 and the recent judgment of the Apex Court in *Sukhdev Singh vs. Union of India and others*, (2013) 9 SCC 573.

9. On the contention raised by the learned counsel for the petitioner regarding non communication of adverse remarks to a public servant is concerned was that the legal position stands crystallised in the aforesaid precedents, leaving no room for any further debate. Counsel also submitted that in *Sukhdev Singh case (supra)*, the principles laid down in *Dev Dutt case (supra)* were held to be legally sound and received approval of the Larger bench.

10. The learned counsel emphasized that *Dev Dutt case (supra)*, had authoritatively held that every entry in the ACR of the public servant must be communicated to him within a reasonable period, whether it was

‘Poor’, ‘Fair’, ‘Average’ or ‘Very Good’ entry. The Supreme Court also held that non communication of such an entry may adversely affect the employee in two ways: (1) had the entry been communicated to him, he would have known about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future; (2) he would have an opportunity of making a representation against the entry, if he felt it was unjustified, and seek its up-gradation. Hence, non-communication of an adverse entry was held to be arbitrary and in violation of Article 14 of the Constitution. The judgment further held that when an adverse entry is communicated to a public servant, he should have a corresponding right to make a representation to the authority concerned, who in turn, must decide the representation in a fair manner within a reasonable period; such representation must be decided by an authority higher than the one who gave that entry, otherwise there would be likelihood that the representation would be summarily rejected without adequate consideration. On the strength of the settled legal principles, counsel submitted that in the case of the petitioner, he was not communicated the ‘*below benchmark*’ grading of his two appraisal reports which were taken into consideration by the DPC at the time of

assessing the suitability of the petitioner for his promotion to the higher rank of Senior Commandant against the vacancy for the year 2004-05. The learned counsel for the petitioner also submitted that the representations concerning his two later ACRs for the period 1.4.2003 to 31.03.2004 and 1.4.2004 to 2.7.2004 were not decided by the officer superior in rank to the accepting officer as required under the relevant DoPT guidelines.

11. In reply, Mr. A.K. Gautam, the learned counsel for the respondent submitted that for the two '*below benchmark*' grading for the period from 1998 to 1999 and from 2002 to 2003, the petitioner could submit his representation to the Competent Authority and likewise he could submit a separate representation concerning his adverse ACRs of the later period which could be decided by the Home Secretary, Government of India, who is superior in rank to the accepting officer in this case. The learned counsel also submitted that in *Dev Dutt case (supra)*, a similar direction was given by the Supreme Court to communicate the adverse entry to the appellant therein within a period of two months and thereafter, for the appellant therein to make a representation against the adverse entry within a period of two months and then the same was directed to be

decided by the Competent Authority within a period of two months thereafter. Counsel further submitted that further direction given by the Supreme Court was that in case his entries are upgraded, then only the case of the appellant therein shall be considered for promotion by the DPC with retrospective effect and not otherwise. To the same effect was the direction given by the Apex Court in *Sukhdev Singh (supra)*, as per counsel for the respondent and therefore, in his submission, the only remedy which the petitioner can avail is to file a fresh representation and if the decision on his representations turns out to be in his favour, only then his matter would be placed before the Review DPC and not that without considering his representations, the review DPC can be held to examine his case by ignoring the adverse ACRs.

12. We have heard the learned counsel for the parties and have also perused the relevant record.

13. The principle contentions raised by the counsel for the petitioner concerning his adverse ACRs can be formalised as under:-

- a) That the non-communication of the *below benchmark grading* in the ACRs is violative of the principles of natural justice and therefore, would be contrary to Article 14 of the

Constitution of India;

b) That the case of the petitioner for promotion to the higher rank of Senior Commandant against a vacancy which arose in the years 2004-2005 should be considered treating the said two non-communicated *below benchmark grading* in the ACRs for the years 1999 and 2003 as *non-est* and five preceding ACRs should be taken into consideration by the review DPC.

c) Whether the representations dated 10.05.2010 filed by the petitioner against his adverse ACRs covering the period of 1.4.2003 to 31.3.2004 and 1.4.2004 to 2.7.2004 were decided by the Competent Authority superior to the rank of Accepting Officer in terms of DoPT guidelines.

14. As far as the first contention of the counsel for the petitioner is concerned, the legal position stands crystallized in so far the issue relating to non-communication of *below benchmark grading* in the ACRs is concerned.

15. In *Dev Dutt (supra)*, the Supreme Court examined the constitutionality of the procedure of non-communication of '*below*

benchmark' ACRs and the Hon'ble Supreme Court after disagreeing with its earlier decision in the case of *U.P. Jal Nigam v. Prabhat Chandra Jain, 1996 SCC (2) 363* took a view that non-communication of entries in the Annual Confidential Report of a public servant whether he is in civil, judicial, or in the police or any other service (other than the military), certainly have adverse consequences because it may affect his chances of promotion or other benefits and hence such non-communication would be arbitrary and as such violative of Article 14 of the Constitution. Relevant paras of the said judgment are reproduced as under:-

"13. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no bench mark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a 'good' or 'average' or 'fair' entry certainly has less chances of being selected than a person having a 'very good' or 'outstanding' entry.
14. In most services there is a gradation of entries, which is usually as follows:

- (i) Outstanding*
- (ii) Very Good*
- (iii) Good*
- (iv) Average*
- (v) Fair*
- (vi) Poor*

A person getting any of the entries at items (ii) to (vi) should be communicated the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided fairly and within a reasonable period by the concerned authority. "

15. *If we hold that only 'poor' entry is to be communicated, the consequences may be that persons getting 'fair', 'average', 'good' or 'very good' entries will not be able to represent for its upgradation, and this may subsequently adversely affect their chances of promotion (or get some other benefit).*

16. *In our opinion if the Office Memorandum dated 10/11.09.1987, is interpreted to mean that only adverse entries (i.e. 'poor' entry) need to be communicated and not 'fair', 'average' or 'good' entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or get some other benefit. For example, if the bench mark is that an incumbent must have 'very good' entries in the last five years, then if he has 'very good' (or even 'outstanding') entries for four years, a 'good' entry for only one year may yet make him ineligible for promotion. This 'good' entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy of his superior, or because of caste or communal prejudice, or for some other extraneous consideration.*

17. *In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways: (1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in **Maneka Gandhi v. Union of India** (supra) that arbitrariness violates Article 14 of the Constitution.*

18. *Thus it is not only when there is a bench mark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an*

outstanding entry should be communicated since that would boost the morale of the employee and make him work harder."

16. In ***Abhijit Ghosh Dastidar v. Union of India & Ors., (2009) 16 SCC 146***, also, the adverse entries were not communicated to the employee. The three Judge Bench after placing reliance on ***Dev Dutt*** case (*supra*) reiterated the same view. The relevant para of the same is reproduced as under:-

"8. Coming to the second aspect, that though the benchmark "very good" is required for being considered for promotion admittedly the entry of "good" was not communicated to the appellant. The entry of 'good' should have been communicated to him as he was having "very good" in the previous year. In those circumstances, in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances for promotion or get other benefits. Hence, such non-communication would be arbitrary and as such violative of Article 14 of the Constitution. The same view has been reiterated in the above referred decision relied on by the appellant. Therefore, the entries "good" if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him."

17. Noticing some inconsistency in the decisions given in ***U.P. Jal Nigam v. Prabhat Chandra Jain, 1996 SCC(2) 363*** and ***Union of India v. Major Bahadur Singh, 2006 (1) SCC 368***, the two Judge Bench while granting leave in the matter, ***Sukhdev Singh (supra)*** has opined that the

matter should be heard by a Larger Bench.

18. In *Sukhdev Singh's case (supra)*, the Court was dealing with a case where an officer was assessed 'outstanding' or 'very good' in most of his Annual Confidential Reports but for two years, i.e., 2000-2001 and 2001-2002, he was assessed with 'good' remarks in his Annual Confidential Reports. The effect of such downgrading was under consideration of the Supreme Court and it has held as under:-

"8. In our opinion, the view taken in *Dev Dutt* that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same, Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR - poor, fair, average, good or very good - must be communicated to him/her within a reasonable period."

9. The decisions of this Court in *Satya Narain Shukla v. Union of India and Ors.* (2006) 9 SCC 69 and *K.M. Mishra v. Central Bank of India and Ors.* (2008) 9 SCC 120 and the other decisions of this Court taking a contrary view are declared to be not laying down a good law."

19. Answering a reference, the three Judge Bench in *Sukhdev Singh* case (*supra*) found itself in complete agreement with the view taken in *Dev Dutt's case (supra)*, particularly paras 17, 18, 22, 37 and 41 of the

same. The Court also declared that earlier decisions of the Supreme Court in *Satya Narain Shukla v. Union of India and Others* (2006) 9 SCC 69 and *K.M. Mishra v. Central Bank of India and ors.* (2008) 9 SCC 120, did not lay down a good law.

20. The same issue was further the subject matter in another batch of petitions, the lead case being *Union of India v. A.K. Goel & Ors., SLP (Civil) No.15770/2009*, but the Supreme Court did not feel the necessity for any further consideration of the issue after having answered the same in *Sukhdev Singh's case (supra)* as aforesaid.

21. In the light of enunciation of legal principles in the above cited judgments, it is no more *res integra* that the non-communication of any entry in ACR, which may adversely affect the employee in his career would be in violation of the principles of fairness and natural justice and thus would be violative of Article 14 of the Constitution.

22. In the facts of the present case also, the below bench mark grading in the two ACRs of the petitioner for the period 1998 to 1999 and 2002 to 2003 were not communicated to him before his case was placed for promotion before the DPC for appointment to the higher rank of Senior Commandant against vacancy for the year 2004-2005 and therefore, such

non-communication of adverse entries on the part of the respondents deprived the petitioner from submitting his representation before the Competent Authority and in the absence of the same, the consideration of the said two ACRs by the DPC was certainly illegal and in violation of the fundamental rights of the petitioner.

23. Now we come to the second aspect of the matter that the direction be given to respondents for holding a review DPC to consider the case of the petitioner for promotion to the higher rank of Senior Commandant against vacancy for the year 2004-2005 without considering the said two adverse ACRs and the contrary submission of the counsel for the respondents that the only course available to the petitioner is to file a fresh representation for decision of the competent authority and in the absence of the same, the matter of promotion of the petitioner cannot be considered by the review DPC. To decide this controversy, we feel it essential to refer to some of the judgments holding the field. The first judgment of the Division Bench, which would be relevant to refer is the case of *Union of India v. Krishan Mohan Dixit* (W.P. (C) No. 6013/2010), which was a lead case in a batch of writ petitions, where the Union of India (UOI) had impugned the various orders passed by the

Central Administrative Tribunal. The UOI felt aggrieved by the CAT's direction to ignore some of the ACRs and to consider some other ACRs, for the purpose of considering the case of promotion of members of Indian Revenue Service, on the ground that the ACRs in question which were below *bench mark* were not communicated to them. In this batch of writ petitions, the Division Bench referred to the principles of law laid down by the Apex Court in ***Dev Dutt's case (supra)*** and also took note of the import of the judgment of the Supreme Court in ***Abhijit Ghosh Dastidar*** (supra). It would be worthwhile to reproduce the relevant paras from the said judgment:-

"12. We are conscious of the fact that dismissing certain writ petitions in limine, this Bench had upheld orders passed by the Tribunal where in the absence of the Reporting Authority/ Reviewing Authority, following *Abhijit Ghosh Dastidar's case* directions were issued by the Tribunal to altogether ignore the below benchmark ACRs and consider the further preceding year ACR which were up to the benchmark. But we must confess that nobody drew our attention to paragraph 37 of the decision in *Dev Dutt's case* as also to the O.M. dated 30.01.1978, relevant extract whereof has been noted in para 4 above. The said decisions are dismissals in limine without reasons and hence are not binding precedents. *Abhijit Ghosh Dastidar's case*, as noted by us hereinabove follows the law laid down in *Dev Dutt's case*, but makes a departure with respect to the final direction issued for the reason the Supreme Court found that *Abhijit Ghosh Dastidar* had superannuated and it was in said context the Supreme Court did not direct further follow up action as per the law laid down by the Supreme Court in *Dev Dutt's case*. It is apparent that the direction in *Abhijit Ghosh Dastidar's case* has to be traced through the power of the Supreme Court under Article 142 of the Constitution of India.

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22. In view of the aforesaid, we are of the considered view that the orders passed by the Tribunal in all these cases cannot be sustained. Thus the orders passed by the Tribunal would stand modified to the extent that the adverse ACRs which falls within the consideration zone i.e. in the relevant 5 years before the date of holding the DPC, if not communicated earlier but are below bench mark would be communicated within a period of 4 weeks from today to the incumbent officer if not communicated so far. The respondent would then be eligible to make a representation within 15 days thereof if not made already, and that such representation would be decided by the competent authority, which, of course, would be higher in rank to the authority who gave the adverse ACR within next 2 weeks irrespective of the fact whether the Reporting Officer or the Reviewing Officer or both are available or not. In case, the ACR is upgraded, making the incumbent eligible for consideration, review DPC would be held based upon the reappraised ACRs for the relevant period within six weeks. In case, the review DPC finds the incumbent fit for promotion, the benefit thereof would be given to him from the date when he was entitled for promotion to the next post had the ACR in question would not have been considered averse to him with all consequential benefits."

24. This aspect of the case also came up for consideration before the Division Bench of this Court in the case of ***Union of India & Anr. v. V.S. Arora & Ors.***, in W.P. (C) No.5042/2002 along with two connected cases and the view taken was that the '*below benchmark*' ACRs which were not communicated cannot be considered by the DPC and the DPC shall treat such non-communicated *below benchmark* ACRs as if they were not written or they were not available for any reason during the relevant period. To arrive at this conclusion, the Division Bench placed reliance on the order passed by the three Judge Bench of the Supreme Court in

Abhijit Ghosh Dastidar (supra) case where the Supreme Court took a view that the grading 'good', if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The Division Bench also had drawn analogy from para 6.2.1/C of DoPT guidelines vide OM No.22011/5/98-Estt. dated 6th October, 2000.

25. The relevant paras from the Division Bench judgment in *Union of India v. V. S. Arora* (supra), decided on 31.05.2012, are reproduced as under:-

"24. Therefore, the position that emerges is that the decision in **Abhijit Ghosh Dastidar** (supra) holds the field. Now, what is it that **Abhijit Ghosh Dastidar** (supra) decides? It has, in the first instance, while affirming **Dev Dutt** (supra), concluded that non-communication of an ACR is violative of the constitutional rights of a government servant/employee. In the second instance, it has stated that such below benchmark ACRs ought not to be taken into consideration while the question of promotion of a particular government servant is in contemplation. Now, that leaves us with the further question as to what is to be done after we ignore/do not consider the below benchmark ACRs. In this regard, we have clear guidelines contained in Chapter 54 of the Manual on Establishment and Administration for Central Government Offices, which have been issued by the Government of India for DPCs (G.I., Dept. of Per. & Trg., O.M. No. 22011/5/86-Estt.(d), dated the 10th April, 1989 as amended by O.M. No. 22011/5/91-Estt.(d), dated the 27th March, 1997 as amended / substituted vide Dept. of Per. & Trg., O.M. No. 22011/5/98-Estt.(d), dated the 6th October, 2000). The relevant portion of the guidelines reads as under:-

"6.2.1. Confidential Rolls are the basic inputs on the basis of which assessment is to be made by each DPC. The evaluation of CRs should be fair, just and

non-discriminatory. Hence –

- (a) The DPC should consider CRs for equal number of years in respect of all officers considered for promotion subject to (c) below.*
- (b) The DPC should assess the suitability of the employees for promotion on the basis of their Service Records and with particular reference to the CRs for **five preceding years** irrespective of the qualifying service prescribed in the Service/ Recruitment Rules. The 'preceding five years' for the aforesaid purpose shall be decided as per the guidelines contained in the DoP&T, O M. No. 22011/9/98-Estt. (D), dated 8-9-1998, which prescribe the Model Calendar for DPC read with OM of even number, dated 16-6-2000. (If more than one CR have been written for a particular year, all the CRs for the relevant years shall be considered together as the CR for one year.)*

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- (c) Where one or more CRs have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if in any case even these are not available, the DPC should take the CRs of the lower grade into account to complete the number of CRs required to be considered as per (b) above. If this is also not possible, all the available CRs should be taken into account.*

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25. From the above, it is clear that the DPC should consider the confidential reports for equal number of years in respect of all the employees considered for promotion subject to (c) mentioned above. The latter sub-paragraph (c) makes it clear that when one or more confidential reports have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if, in any case, even these are not available, the DPC should take the CRs of the lower grade into account to complete the number of CRs required to be considered as per sub-paragraph (b) above. If this is also not possible, all the available CRs should be taken into account. We are of the view that the same would apply in

the case of non-communicated below benchmark ACRs. Such ACRs would be in the same position as those CRs which have not been written or which are not available for any reason. Thus, it is clear that below benchmark ACRs, which have not been communicated, cannot be considered by the DPC and the DPC is then to follow the same procedure as prescribed in paragraph 6.2.1 (c), as indicated above."

26. After the aforesaid decision in **V.S. Arora** case (supra), another Division Bench of this Court decided W.P. (C) No.4018/2011 titled **Swati S. Patil v. Union of India** on 1.4.2013 where an officer of Indian Revenue Service (1974 batch), had a problem with the Annual Confidential Report for the year 2003-2004 wherein she was graded 'good', a grade which was *below bench mark* from 'very good' and the petitioner approached the Central Administrative Tribunal to seek direction that the said *below bench mark* ACR grading should be totally ignored by the Departmental Promotion Committee for the reason that it was only the initiating officer who had penned down his opinion in his ACR proforma, and it was never accepted by the Accepting Authority or by the Reporting Authority. The Tribunal relying upon the judgment of the Supreme Court in the case of **SBI vs. Kashi Nath Kher**, AIR 1996 SC 1328 gave a direction for ignoring the said 'below bench mark' grading of the ACR in question and stated that an earlier ACR should be taken into consideration. Feeling aggrieved by such an order passed by the

Central Administrative Tribunal, the Union of India had approached this Court preferring W.P. (C) No.4018/2011. The Division Bench of this Court, although had concurred with the view taken by the Tribunal, as court found that in the facts of that case, the law applicable would be the one as declared by the Supreme Court in ***Kashi Nath's*** case (supra). In the said judgment, the Division Bench also referred to the earlier decision given by the Division Bench in ***V.S. Arora*** case (supra) and took a view that the Division Bench which had authored the judgment in ***V.S. Arora*** case, perhaps had overlooked para 37 of the judgment of the Supreme Court in ***Dev Dutt vs. Union of India & Ors.***, (2008) 8 SCC 725. It further held that the Division Bench has overlooked the fact that there is no conscious reasoning in ***Abhijit Ghosh Dastidar vs. Union of India & Ors.***, (2009) 16 SCC 146, as to what should happen when the reporting and reviewing as also the accepting authority have retired. The Division Bench also observed that the non reasoned direction given by the Apex Court in the ***Abhijit Ghosh Dastidar*** case to direct retrospective promotion of appellant without re-appraisal of his ACRs by the Departmental Promotion Committee was in exercise of power vested in the Supreme Court under Article 142 of the Constitution of India. It

further held that the Supreme Court had noted that a person junior to the petitioner namely Abhijit was promoted in August 2000 and thus it was directed that the petitioner too would be promoted, but without any back wages.

27. In the last para of the judgment *in Swati S. Patil (supra)*, the Division Bench also took a view that whether or not the *V.S. Arora* case (*supra*) correctly appreciated the law declared by the Supreme Court in *Dev Dutt's* case and *Abhijit Ghosh Dastidar* case (*supra*) or whether the earlier Division Bench correctly understood the same in *Krishan Mohan Dikshit's* case and if any such situation arises in future where such kind of conflict squarely falls for consideration, then in such an event, the matter may be required to be referred to a Larger Bench for reference .

28. Undeniably, we find that there arose some dichotomy in the views taken by the different Division Benches of this court on the issue in hand. In a batch of writ petitions decided on 8th October 2010, in the lead case being W.P. (C) No. 6013/2010 *Union of India vs. Krishan Mohan Dixit*, the Division Bench took a view that in *Abhijit Ghosh Dastidar's* case, the Supreme Court followed the law laid down in *Dev Dutt* case but made a departure with respect to the final direction issued for the reason that

the Supreme Court found that Abhijit had superannuated and it was in the said context that the Supreme Court did not direct to relegate him to follow the procedure as directed by the Supreme Court in *Dev Dutt's* case. It is in this background, the Division Bench took a view that such a direction in *Abhijit Ghosh Dastidar* case has to be identified with the powers exercised by the Supreme Court under Article 142 of Constitution of India.

29. In *Union of India v. V.S. Arora* and others, the Division Bench of this Court was again confronted with a similar issue and judgment in this case was delivered on 31st May 2012. The Division Bench also placing reliance on the three Judge Bench decision in *Abhijit Ghosh Dastidar* case took a view that below bench mark ACR which has not been communicated, cannot be considered by the DPC and the same should be treated as if such ACR(s) is not with them and in such like cases to follow the same procedure as prescribed in para 6.2.1 (c) of DoPT Guidelines vide OM No. 22011/5/98-Estt.(d) Dated 6.10.2000.

30. In *Swati S. Patil case (supra)*, where the judgment was delivered on April 1, 2013, the Division Bench had touched upon the issue but kept the same open to be decided in future if such conflict comes up for

consideration then in such a case, the matter needs to be decided by a Larger Bench.

31. Noticeably, the judgment of **Krishan Mohan Dixit** was not cited before the Division Bench, considering the batch of writ petitions in **V.S. Arora's** case and had it been so cited then, perhaps the Division Bench dealing with **V.S. Arora's** case could have then referred it to a to the Larger Bench. Anyhow, in our view, the decision given by the Larger Bench of Supreme Court in **Sukhdev Singh vs. Union of India and others, (2013) 9 SCC 573**, has cleared the clouds over this issue. Therefore, in our view it is no more desirable to refer the matter to the Larger Bench.

32. It is noteworthy that the Three Judge Bench decision in **Sukhdev Singh** case was delivered on 23.04.2013 and therefore, this decision was neither before the Division Bench dealing with **V.S. Arora's** case and nor could it be cited when **Swati S. Patil** (supra) and **Krishan Mohan Dikshit** (supra) were decided.

33. The judgment in **Sukhdev Singh (supra)** is in fact a reiteration of the legal principles laid down by the Division Bench of the Supreme Court in **Dev Dutt** case (supra). In para 6 of the judgment in **Sukhdev**

Singh (supra) the Supreme Court held that they are in complete agreement with the view taken in **Dev Dutt's** case, particularly paragraphs 17, 18, 22, 37 and 41. The Court also referred to the decision given by the Three Judge Bench in **Abhijit Ghosh Dastidar** (supra) and after having reproduced para 8 of **Dastidar's** case, it was held that in their opinion, the view taken in **Dev Dutt** case that every entry in the ACR of a public servant must be conveyed to him/her within a reasonable period, is legally sound.

34. The following paras from the Sukhdev Judgments are gainfully referred as under:-

"8. In our opinion, the view taken in Dev Dutt that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same, Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR - poor, fair, average, good or very good - must be communicated to him/her within a reasonable period.

9. The decisions of this Court in Satya Narain Shukla v. Union of India and Ors. (2006) 9 SCC 69 and K.M. Mishra v. Central Bank of India and Ors. (2008) 9 SCC 120 and the other decisions of this Court taking a contrary view are declared to be not laying down a good law.

10. Insofar as the present case is concerned, we are informed that the Appellant has already been promoted. In view thereof, nothing more is required to be done. Civil Appeal is disposed of with no order as to costs. However, it will be open to the Appellant to make a representation to the concerned authorities for retrospective promotion in view of the legal position stated by us. If such a representation is made by the Appellant, the same shall be considered by the concerned authorities appropriately in accordance with law."

35. It would be seen that in *Sukhdev Singh* case, the Supreme Court did not direct retrospective promotion of the appellant therein and unlike the view as taken in *Abhijit Dastidar* case by the Supreme Court it was held that it would be open to the appellant to make a representation to the authorities concerned for his retrospective promotion in view of the legal position stated. Nowhere has the Supreme Court held that non communicated adverse ACR could be treated as *non est*. Indeed, in *Sukhdev Singh case* (supra) the Supreme Court fully adopted and endorsed the reasoning and legal principles enunciated in *Dev Dutt* case (supra) and even while granting the final relief the Court preferred to observe the right of the public servant to make a representation against his adverse entry to the concerned authority and his right to a decision on such a representation.

36. In *Dev Dutt* case (supra) as well, the emphasis of the Supreme Court was on the communication of an ACR, irrespective of whether the

entry was 'good', 'average' or 'fair', it was to observe the right to the public servant to make representation against an adverse entry to the concerned authority, and that the decision of the competent authority on such representation of the employee ought to be in a fair manner and within reasonable period.

37. We may also point out here that in ***Dev Dutt*** case, the grievance raised by the employee was that he was not communicated about the 'good' entry of 1983-1984, which was '*below benchmark grade*' of 'very good' and the DPC in its meeting held on 16th December 1984 denied him the promotion because of the said non communication of the below benchmark grading. After discussing the legal position, the Court directed the respondents to communicate the 'good' entry to the appellant within a period of two months and accorded the appellant an opportunity to represent against the said entry. If he so choose, within a period of two months; the competent authority was to take a decision on such representation within a period of two months.

38. ***Dev Dutt (supra)*** further laid down that the representation made by the employee against an adverse entry in his ACR must be decided by an authority, higher than the one who gave the entry, otherwise in all

likelihood the representation would be summarily rejected. Relevant para of *Dev Dutt (supra)* is extracted as under:-

"5. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible. In our opinion, non-communication of entries in the Annual Confidential Report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution."

39. As can be seen from the foregoing paras, the entire emphasis in the above judgments was first to inform the employee with regard to his grading, which is *below benchmark* and could come in the way of his promotion. Indeed, the Court went to the extent of conveying all sorts of gradings so that an employee can be made aware of his merits/demerits during the course of a particular year. Secondly, emphasis was to accord the right to an employee to file a representation and for such representation to be decided by an officer superior in rank to the officer

who has assessed him in the appraisal report, so that his adverse ACR is not summarily rejected by the assessing officer.

40. In the present case, the petitioner was promoted as Senior Commandant in the DPC held against the vacancy for the year 2011-2012. As per the case of the petitioner, he deserved this promotion to the post of Senior Commandant against the vacancy for the year 2004-2005 as in the DPC held in the month of April, 2005, his juniors were promoted to the said rank but he was denied promotion due to the said non-communication of "*below benchmark*" grading for the years 1998-1999 and 2002-2003. The other grievance of the petitioner is that his representation dated 10.05.2010 was not decided by the competent authority, superior to the rank of the accepting officer, therefore, his two subsequent *below benchmark* grading ACRs for the period between 01.04.2003 to 31.03.2004 and from 01.04.2004 to 02.07.2004 be also considered as *non est* while considering his case for promotion by the Review DPC.

41. We note that the Supreme Court has neither taken the view nor implied that non-communicated ACR of an employee could be ignored, as if the same was never written or was non-est. Neither do we find this

analogy in any of the DoPT Guidelines nor in the judgments of the Supreme Court. If the non-est argument is accepted, it would defeat the very rationale of the aforesaid judgments of the Supreme Court, which recognises the right of a government employee to be communicated an adverse ACR i.e. a rating lesser than the highest, so that if aggrieved, he could file a representation before the competent authority, and in case there is an erroneous decision at the end of the officer entrusted to appraise his report, the same can be rectified by the officer superior in rank to the accepting officer and thereafter, his case for promotion could be placed before the Review DPC. However, if we accept the reasoning as suggested by the counsel for the Petitioner, then an officer against whom there may be serious charge/complaint with regard to his performance, conduct, behaviour, efficiency and potential etc., he would be promoted simply because his adverse ACR was not communicated to him/her or was not decided by the competent authority or for some other similar reason. In our considered view, such a situation will have deleterious effect on the entire scheme of service promotions because in such cases, an officer may be rewarded with promotion despite the fact that he is not upto the requisite mark, on the parameters of his

performance, conduct, behaviour, efficiency and potential, etc. In such like cases of non-communication of *below benchmark* grading in the ACR or where the representation is not decided by the officer superior to the rank of Accepting Officer, there would be postponement in the decision of Departmental Promotion Committee as ultimately if the representation is decided in favour of such an employee then he will get the promotion retrospectively with all other consequential benefits. For the aforesaid reasons, we are not persuaded by the contention of the learned counsel for the petitioner to let the case of the petitioner be placed before the Review DPC, by treating the said adverse ACRs for the years 1998-1999 and 2002-2003 as if they were never written, because of their non-communication to the petitioner.

42. In the light of aforesaid discussion, we give the following directions:-

- i. *Let the petitioner file a fresh representation challenging his below benchmark grading in the ACRs for the years **1998-1999 and 2000-2001** and the same shall be considered by an officer higher to the rank of the Accepting Officer and the representation of the petitioner shall be decided by the Competent Authority within a period of four weeks from the date of this order.*

- ii. *The Competent Authority shall also decide the representation of the petitioner dated 10.05.2010 within a period of four weeks.*
- iii. *In the event of up-gradation of his adverse entries, the appellant shall be considered for promotion retrospectively by the Review DPC within a period of two months thereafter and if he gets selected for promotion retrospectively, then he shall be entitled to seniority from such date and to arrears of pay and all other consequential benefits.*

43. With the aforesaid directions appeal is allowed. No costs.

KAILASH GAMBHIR, J.

NAJMI WAZIRI, J.

OCTOBER 01, 2014
pkb/v